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IN THE

Supreme Court of the United States

No. 75-2781

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants (Petitioners in No. 75-62)

Petition for Writ of Certiorari
To The
United States Court of Appeals
For The Fourth Circuit

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Petition for Writ of Certiorari
To The
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For The Fourth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in its cases No. 73-2348, No. 73-2349 and 73-2350 (consolidated with cases No. 73-2351 and No. 73-2352 on trial and appeal).

OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals sitting *en banc* together with the opinion on rehearing are reported at 515 F.2d 1082 (App. 1a). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Div. (Bryan, J.) is reported at 363 F.Supp. 1200, (App. 35a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1975. Rehearing applications by this petitioner and others were denied with opinion by order made May 26, 1975 and entered May 29, 1975. The jurisdiction of this Court arises under 28 U.S.C. §1254(1).

The Court of Appeals, pursuant to 28 U.S.C. § 2403, has certified to the Attorney General that the constitutionality of 42 U.S.C. § 1981 has been drawn in question.

Petitions for certiorari raising the same or closely related issues have been filed in this Court by the defendants in this case (No. 75-62); by the defendants in the consolidated case (No. 75-66); and will be filed in *Cook v. Hudson*, (No. _____), the last on behalf of teachers having public school contracts terminated after sending their own children to private white schools. A possibly related issue is raised in No. 74-1568 *(Wind River Indian Education Ass'n v. Ward)*.

A related issue will be argued *en banc* before the Fifth Circuit on or about September 16, 1975, *Riley v. Adirondack Southern School For Girls* (No. 74-1976) and could be consolidated for argument with *Brown v. Dade Christian Schools*, now on appeal to that Court (No 75-3260) from a decision of the United States District Court in Florida which followed the majority opinion in this case.

QUESTION PRESENTED FOR REVIEW

The statement of the issue as concurred in by all judges of the Fourth Circuit, was as follows:

> The issue in this case is whether 42 U.S.C.A. § 1981 prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

STATUTES

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Thirteenth Amendment

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1981. *Equal rights under the law.*

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

> enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Two Negro minors by their parents as plaintiffs in the District Court, asserted an appropriate level of scholastic competence and sought declaratory and injunctive relief for a refusal to admit them on the grounds of their race to defendants' allegedly white private school in Arlington (4).[1] The complaint alleged and defendants denied that admission to any private school facility is a "contract" within the meaning of the Civil Rights Act of 1866 (42 U.S.C. § 1981) and argued that such a racial admission limitation was therefore a denial to them and their class of the same right "to make and enforce contracts . . . as is enjoyed by white citizens" under § 1981 and violated their right to equal enjoyment of "places of public accommodation" (7).

This petitioner (SISA), is an association of six Southeastern non-profit state private school organizations which have memberships which include a substantial number of private schools which concededly have racial limitations on admission. Neither the school operated by defendants nor the school involved in a companion case tried with

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[1] Plain number references are to pages of Part I of the Joint Appendix filed in the Court of Appeals and forwarded in printed form to this Court under Rule 21(2).

it, are members of SISA or of its component state associations.

SISA was granted intervention below as an individual and class defendant (13). In its answer to the complaint, SISA denied that the infant plaintiffs were granted a right by § 1981 or otherwise to invoke judicial assistance to compel their admission to any private school of their choice (14). By counterclaim which plaintiffs denied, SISA alleged that its schools were in fact privately owned and maintained, were academically advanced over public education and prayed for a counter-declaration affirming the constitutional right of the parents of its students to express their educational opinions by selecting any private school for their children which conformed to their preferences – whether or not its admission policy was such as to exclude one or more constitutionally significant classes of applicants (15).

In proof of its factual allegations, SISA stipulated with plaintiffs as follows (17):

> 1. A substantial proportion of the schools represented by intervenor deny admission to applicants of the Negro race.
>
> 2. The schools represented by intervenor admit applicants only in the discretion of the school authorities.
>
> 3. The schools represented by intervenor are privately owned, financially supported by tuition paid by the parents of the students and, in some cases, supplementary private gifts.
>
> 4. The schools represented by intervenors are located in areas having cost-free, desegregated

> public education available to all children, and the parents of the students in schools represented by intervenor are taxpayers who pay their proportionate share of federal, state and local taxes for the maintenance of such public system of education.
>
> 5. The sole basis of jurisdiction asserted by plaintiffs in this action is 42 U.S.C. § 1981.

In proof of the balance of its allegations SISA introduced uncontradicted evidence before the trial court, to show (a) that as a result of its use of limited admission policies, its private schools had achieved demonstrably higher academic results and have had fewer disciplinary problems than the public schools of their area (33, 54) and (b) that on the basis of these scholastic records and in the light of the controversial state of scientific opinion about educational methods (43-51), the choice of a limited admission private school could not be said to be so irrational as to deny the parents a judicial declaration of their constitutional right to so associate their children for the practical expression of their educational beliefs.

On July 27, 1973, after trial, the District Court found as a fact that the defendants' school had excluded the infant plaintiffs some three years earlier by reason of their race (App. 38a, 39a). The court noted that the infant plaintiffs had since been admitted to other private schools of their choice and were making satisfactory progress (App. 38a).

On the law, the Court ruled that the 42 U.S.C. § 1981 applied to private as well as state-enforced discrimination, that the defendant school was not "truly private" since it was "open to every white child," and therefore that a right of admission to a white private school was a right

to "contract" within the intendment of § 1981. The Court also held that since § 1981 was limited in terms to rights ". . . enjoyed by white citizens," its prohibitions were not applicable to non-white races or to private all-Negro, all-Chinese or rabbinical schools (App. 41a). The Court denied class representation either by plaintiffs or SISA (App. 40a).

In its order the Court granted the requested declaration of right that racial discrimination in private school admissions violates § 1981 (App. 43a). It held SISA's evidence of the scholastic value of limited admission schools to be irrelevant under *Brown v. Board of Education* (App. 42a) and dismissed intervenor's counterclaim for failure to state a cause of action (App. 45a).

Upon its opinion the District Court issued an injunction against the school of defendants and all private schools associated with SISA to prohibit any further denial of admission to Negro applicants (App. 43a). Damages were awarded (App. 44a) and supplemental orders were later entered (App. 45a) (71).

An appeal was taken by SISA from the District Court's dismissal of its counterclaim and its correlative declaration of a statutory right in the Negro plaintiffs to compel admission to private white schools.

The appeal was heard *en banc* on April 2, 1974. The decision of the Fourth Circuit was issued on April 15, 1975. Four of the seven judges affirmed the holding of the District Court, citing this Court's rulings in *Jones v. Mayer*, 392 U.S. 409 (1968), *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973). The opinion denied that the question had been considered here in *Norwood v. Harrison*, 413 U.S. 455 (1973). The opinion concluded

> Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.
>
> 515 F.2d at 1087-88 (App. 11a).

Three Circuit judges, accepting the issue as defined by the majority, dissented from their holding on the ground that the question was "one of first instance in any federal court at this or higher level," (App. 21a-22a) that *Jones*, *Sullivan*, and *Tillman* were not controlling since they dealt with rights in real property under § 1982, and that the right to make contracts "does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (App. 22a). The dissenters further argued that the applicable policy was one of associational right as set out by this Court in *"Moose Lodge v. Irvis*, 407 U.S. 163 (1972), and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974)" (App. 23a) concluding:

> As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 U.S.C. § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S.

> 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:
>
> > "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.
>
> 515 F.2d at 1096-97 (App. 30a-31a).

A stay pending certiorari was granted by the Circuit Court. Intervenor here prays the issuance of a writ of certiorari to review the judgment of the Fourth Circuit denying its private schools the right of limiting admissions by race.

REASONS FOR GRANTING THE WRIT

I

THE ISSUE IS ONE OF MAJOR CONSTITUTIONAL IMPORTANCE AND IS DIRECTLY PRESENTED FOR RESOLUTION ON THIS RECORD

In holding that 42 U.S.C. § 1981 requires the compulsory admission of black applicants to private white schools, the decision below has created a constitutional conflict between the First Amendment rights of parents under the *Pierce* doctrine, and the Thirteenth Amendment right of blacks to be free from private discrimination amounting to an incident or badge of slavery.

The *Pierce* doctrine was summarized in *Norwood* (p. 462) as

> . . . the constitutionally protected choice [of parents] to send the children to private [white] schools.

Both opinions below accept this rule as

> . . . a form of exercising freedom of association protected by the First Amendment.
>
> *Norwood*, p. 470.

and agree that as a general proposition parents may send their children to any private school which expresses their educational beliefs. (App. 11a, App. 26a).

The character of that belief in the case of the parents whose children attend the schools of intervenor was stated in *Norwood* to be (p. 469),

> ". . . that segregation is desirable in education."

But, as the majority below has further held, this is the one private belief that is not permitted to be expressed in any corresponding private school because segregation in education is a form of private bias which this Court in *Jones, Sullivan,* and *Tillman* is said to have held to be prohibited by Congress when it exercised its Thirteenth Amendment authority by the enactment of the predecessor to 42 U.S.C. § 1981.

Intervenor denies that this Court has so ruled or that such a conclusion is required by those opinions, and adds first, that the holding sought to be reviewed violates the intendment of Congress in its enactment of the predecessor 1866 Act, and second, that the Circuit has thereby created a constitutional conflict which did not previously, and, in the opinion of intervenor does not now, exist.

The issue is ripe for decision on this record. The question now posed is solely one of law. On the face of the trial record, there are no open questions of fact as to the schools of intervenor. They are each concededly private non-profit institutions supported by tuition and gifts. They are located in areas having locally available desegregated public schools.[2] They select their pupils in their own individual discretion, and they meet all state educational requirements. Their parents pay private tuition in addition to taxes which support the local integrated public schools. By limiting their admissions to a single constitutionally significant class they have achieved a higher

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[2] Plus 138 private racially integrated schools (Fourth Circuit brief *amicus* of Council for American Private Education, p. 2) said to be located "in the same area of the country as the schools which are affiliated in the Intervenor." (p. 13)

academic result and have fewer disciplinary problems than do the public schools in their areas.[3]

The existence of any conflicting constitutional rights of the parties is therefore directly presented by this record and its determination by this Court will assist in defining the extent to which any citizen retains an educational choice.

II

THE DECISIONS OF THIS COURT HAVE BEEN MISREAD. THEY DO NOT REQUIRE THE "CONTRACT" PHRASE OF § 1981 TO BE EXTENDED TO RACIAL DISCRIMINATION IN PRIVATE SCHOOL ADMISSIONS

Admittedly, the precise question has never previously been answered. In 1968 in *Jones v. Mayer*, you held that Section 1 of the 1866 Act was intended by Congress to prohibit certain forms of private discrimination which constituted badges or incidents of slavery within the meaning of the Thirteenth Amendment. That interpretation was restated in your *Sullivan* and *Tillman* decisions. The courts below now hold that those three decisions require blacks to be admitted to white private schools (App. 40a).

> If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering

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[3] This last sentence was held to be irrelevant under *Brown v. Board of Education* (App. 42a). But *Brown* not only held that it was solely concerned with public education but that it was peculiarly the sanction of official action by the states which made segregated schooling psychologically detrimental to blacks, 347 U.S. 483, 493 (1954).

> 42 U.S.C. § 1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973). The purpose of both is to prohibit all racial discrimination against non-whites, whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra*, at 423. In other words, no state action is necessary to invoke § 1981.
>
> (District Court opinion, App. 39a-40a).

> As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable . . . . That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and for us, is firmly established.
>
> (Court of Appeals opinion, App. 9a)

But intervenor says this result is not mandated by your holdings in those three decisions for at least three reasons. First, they were each specifically concerned with the scope of the right to purchase property under § 1982, a well-known problem of slavery. They did not deal with "contracts" under § 1981. Second, while *Jones* and *Tillman* arguably concur that some forms of private discrimination would be prohibited by § 1981, the circumstances under which it would be so extended were left open for further consideration. Third, which intervenor does not here argue, the decisions of this Court and others indicate that

the presence of First Amendment rights in opposition are a limiting factor on legislative interpretation as are the subject matters of modern Civil Rights legislation against private discrimination.

1. *The Courts Below Misread Jones, Sullivan and Tillman. These were Rulings on § 1982 only.*

In *Jones v. Mayer* this Court took note that only state-supported discrimination was prohibited by the Fourteenth Amendment and therefore any applicability of the 1866 Act against private bias had to depend on such discrimination being established as a badge or incident of slavery within the scope of the constitutional delegation of authority given to Congress in the second paragraph of the Thirteenth Amendment. On a review of the legislative history of the 1866 Act, this Court concluded that § 1982 had been originally intended by Congress to prohibit private racial bias burdening transfers of real property and this view has since been uniformly applied, *Sullivan v. Little Hunting Park, Inc., supra.*

Intervenor says that the same limitation is equally true as to this Court's *Tillman* opinion. The complaint in that case did cite § 1981 as well as § 1982, and possibly for that reason both judgments below specifically rely on *Tillman* as compelling a broad interpretation of the "contract" clause of § 1981. But that was not the holding of this Court. On its facts, *Tillman* was a § 1982 case and dealt – as did *Jones* and *Sullivan* – with the extent of rights acquired under a real property transfer,

> When an organization links membership benefits to residency in a narrow geographical area,

> that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area.
>
> . . .
>
> We hold, as a consequence, that *Wheaton-Haven* is not a private club and that it is not necessary in this case to consider the issue of any implied limitation of the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a(e), is under consideration. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d. 627 (1972); *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969).
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> 410 U.S. 437, 438-9, 93 S.Ct., 1090, 1094 (1973).

And on remand, the District judge confirmed that the action taken by the Court in *Tillman* was a reading of § 1982, 367 F.Supp. 860 (D. Md. 1973). *Accord, Riley v. Adirondack Southern School for Girls*, 368 F.Supp. 392, 396-7 (M.D. Fla. 1973)

Jones, Sullivan, and *Tillman* are therefore not precedents on the scope of the application of § 1981 to private discrimination in the making and enforcement of contracts.

2. *Only Such "Contracts" as to Which Private Discrimination Would Constitute a "Badge or Incident of Slavery" are Within the Ambit of § 1981.*

This Court noted in *Jones* that §§ 1981 and 1982 were not enacted in the usual course of legislation. Since "the Constitution does not proscribe private bias" (*Norwood*, p. 469) the power of Congress to legislate against an

individual's discrimination by race, sex, or religion must be traceable to some constitutional delegation of specific legislative authority. For example, the anti-discrimination provisions of the 1964 Civil Rights Act were shown to be an exercise of the power of Congress over interstate commerce, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and justified as a codification of "the common-law inn-keeper rule which long pre-dated the Thirteenth Amendment," (p. 261). The similar provisions in Section 1 of the 1866 Civil Rights Act on the other hand were sustained by reference to the constitutional delegation under the second paragraph of the Thirteenth Amendment, which, as this Court put it, authorized Congress to legislate against such examples of private bias as had theretofore constituted a badge or incident of slavery, *Civil Rights Cases*, 109 U.S. 3 (1883).

The inability to make an enforceable contract, shared before 1866 by slaves, minors and incompetents, was eliminated as to former slaves by § 1 of the 1866 Act – now in part § 1981. But this was the removal of a legal disqualification of the newly freed citizens, not the grant of an affirmative and preferential right, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Long v. Ford Motor Co.*, 496 F.2d 500 (6 Cir. 1974). Blacks and others were given the rights of a "white person", not a new form of legal status. But the legal status of a claim of right to compulsory association is clear. Before 1866 and still today a white person has had no standing in law to compel others to admit him to an organization, *Moose Lodge v. Irvis, supra, MacDonald v. Shawnee Country Club, Inc.*, 438 F.2d 632 (6 Cir.) *cert. den.* 403 U.S. 932 (1971), *Wesley v. City of Savannah, Ga.*, 294 F.Supp. 698 (S.D. Ga. 1969), *Central Presbyterian Church v. Black Liberation Front*, 303 F.Supp. 894 (E.D. Mo. 1969).

Compulsory admission to a private school was never a right of white citizens and therefore the denial of such a right could not be a 'badge or incident' of slavery. That this was not intended to be a right under § 1981 was particularly affirmed on the explication of the 1866 Act given by its Floor Manager, Congressman Wilson,

> This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities". What do these terms mean? Do they mean that in all things civil, social, political, all citizens without distinction of race or color, shall be equal? By no means can they be so construed . . . . Nor do they mean that all citizens shall sit on the juries or that their children shall attend the same schools. These are not civil rights or immunities.
>
> (Cong. Globe 1866, Mar. 1, p. 1117).

Consensuality is at the heart of all contract doctrine. True, in *Jones* the property owner did not want to sell but was a large scale corporate developer. In *Sullivan* the property sale was consented to by the owner and only the extent of the rights passed were in question. In *Tillman* the contract in the swim club had already been made and only the scope of the rights under it were considered. In short, nothing in this Court's decisions has ever conferred preferential rights of compulsory contracting on black citizens. It has merely been held that what they receive in a transaction shall not be less than a white citizen would receive whenever some third private party was

willing to contract with him, *Cook v. The Advertiser Co., Inc.*, 458 F.2d. 1119, 1124 (5 Cir. 1972), *Sims v. Order of United Commercial Travelers of America*, 343 F.Supp. 112 (D. Mass. 1972).

The prerequisite of consent to a private contract was not a disability of slavery but one of law applicable to all citizens and therefore cannot fall within the types of private discrimination to be prohibited under § 1981.

III

THE RULING BELOW IS IN CONFLICT WITH THE PRIOR HOLDINGS OF THIS COURT

The constitutionality of maintaining a white private school has been before this Court by necessary implication in three prior cases involving differing forms of state action, denying them (1) use of free state textbooks in *Norwood v. Harrison, supra*, (2) access to public athletic grounds in *Gilmore v. City of Montgomery, Alabama, supra*, and (3) educational tax exemptions in *Coit v. Green*, 404 U.S. 907 (1971) *aff'g. per curiam Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971).

In *Norwood* (p. 469) it was held

> The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

Gilmore held that "private segregated school groups" could not be given exclusive use of city-owned recreational facilities on the same basis as others. This Court said (94 S.Ct. at 2427)

> We close with this word of caution. It should be obvious that the exclusion of any person or group – all-Negro, all-oriental, or all-white – from public facilities infringes upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in *Moose Lodge*. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180, 92 S.Ct., at 1975. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change.

The three-judge opinion which was summarily affirmed by this Court in *Coit v. Green*, stated of these intervenor schools

> The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the constitutionally protected right to belong to political groups embracing both legal and illegal

> aims so long as one does not intend to engage in acts in furtherance of their unlawful purposes. *Scales v. United States,* 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), *Elfbrandt v. Russell,* 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1966). "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button,* 371 U.S. 415, 444-445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963).
>
> Neither plaintiffs' prayers nor defendants' policy seeks to stop intervenors from sending their children to segregated private schools at their own expense, paying the full cost of education at such schools.
>
> 330 F.Supp. 1150 at 1166, *aff'd. per curiam* 404 U.S. 997, 92 S.Ct. 564 (1971).

Intervenor says that in each of these three cases the constitutionality of the continued maintenance of segregated private schools was a necessary pre-determination to the actual decision. To the contrary, both the District Court and Circuit majority have ruled that this Court's statements should not be so interpreted and the question is therefore novel (App. 13a, 42a-43a). The District Court repeated your *Norwood* language (App. 42a-43a)

> Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison,* 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the

> Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.* was cited to the contrary as an example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095.

The fact that § 1981 was not involved in *Norwood* is not the point. It can hardly be said that this Court overlooked that statute particularly since it pointed out that *Jones*, based on the same origins, was an example of unlawful private discrimination.

On the other hand, the Court of Appeals did agree (App. 13a) that § 1981 had been considered by you in *Norwood*

> Finally the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation

in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

In the opinion of intervenor the holding below is in direct conflict with your decisions in *Coit*, *Norwood*, and *Gilmore* and certiorari should be allowed to correct the error.

CONCLUSION

The petition should be granted, the judgment of the Court below reversed and the case remanded to the District Court to grant the declaratory judgment prayed in intervenor's counterclaim. In support of this prayer intervenor has here shown that the issue is one of major constitutional proportion, fully presented on this record, that the Courts below have misread the rule established by your opinions in *Jones*, *Sullivan*, and *Tillman*, and the judgment sought to be reversed is in conflict with your decisions in *Coit*, *Norwood*, and *Gilmore*.

Respectfully submitted,

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Counsel for Petitioner

August 22, 1975.

APPENDIX

[Filed April 15, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Defendants,
Southern Independent School Association,
Appellant.

No. 73-2349

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Appellants,
Southern Independent School Association,
Defendant.

No. 73-2350

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary,
Plaintiffs,

Colin M. Gonzales, infant by Raymond
Gonzales and Margaret R. Gonzales,
Appellants,

v.

Russell L. Runyon, Katheryn E. Runyon,

Southern Independent School Association,
Appellees.

No. 73-2351

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

No. 73-2352

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellants,

v.

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974. Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V.O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. § 1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

(continued)

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales' visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied

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[1] (continued) and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales' telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two-year-old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales' or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va., 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales' were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developed had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman - Reconstruction and Reunion, 1207, *et seq.* That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed

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[3] 14 Stat. 27.

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ***freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right

is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park, supra.* Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood v. Harrison,* 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not

direct recipients of public funds. Their actual and potential consistency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases in which damages for such injuries are denied.[5] That damages are recoverable for violations of § § 1981 and 1982 is established by *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, 240, in which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma

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[5] After the recent decision of the Virginia Supreme Court in *Womack v. Eldridge,* 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214 (1973).

which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy,"[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties

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[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1205 n. 5.

recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient.

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[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI, of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights stautes. We have recognized that a plaintiff under Title VII might recover attorney fees.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment. discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F.2d 143, (§§ 1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified*

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[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968, the Act applied to all dwellings, 42 U.S.C. § 3603(a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603(a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

on other grounds sub nom., Harper v. Kloster, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper v. Allen,* 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

exceptions applicable.[13]

AFFIRMED IN PART.
REVERSED IN PART.

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, had allowed attorney's fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award

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[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when dependants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"[14] of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have ot restricted the

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[14] *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorneys' fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States v. Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982, and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending prequisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

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[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C., 1971), the United States District Court for the Western District of North Caroline held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C. D., Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also, *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the Federal Government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post-Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, *et seq.* Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post-Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second-class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L. Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982, were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

made no attempt to prevent racial discrmination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: *i.e.*, (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).[4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

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[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalist*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we

(continued)

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational instutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social inteest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting[5] opinion in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), stated, at p. 179, the proposition thus:

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4 (continued)

contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F. Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School at 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to

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[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, *et seq.*, citing Roecoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L. Rev. 471 at 478, 479 (1973), and 74 Col. L. Rev. 449, 468, 469 (1974).

be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of Section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in Section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination*, 74 Col. R. Rev. 449, at 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian

terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, *supra*, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972, 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first-class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these ap-

pellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necesary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a

religious school in *Pearce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

We would reverse the judgment of the district court on all points.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2351

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Fairfax-Brewster School, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

Filed April 15, 1975

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

[Filed May 29, 1975, by William K. Slate, II, Clerk]

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,	:
Appellees,	:
v.	:

Russell L. Runyon, Katheryne E. Runyon,
Defendants,

Southern Independent School Association,
Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the

> first sentence of Virginia Code § 8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five-year statute, the second sentence of § 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford*, 4th Cir. 462 F.2d 615; see *Almond v. Kent*, 4th Cir., 459 F.2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code § 8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorneys' fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allowance of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra*, 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

[Filed July 27, 1973]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al.*,	:	
Plaintiffs,	:	**Civil Action No.**
v.	:	**494-72-A**
FAIRFAX-BREWSTER SCHOOL, INC.	:	
Defendant,	:	
and	:	
MICHAEL C. McCRARY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No.**
RUSSELL L. RUNYON, *et al.*,	:	**495-72-A**
Defendants,	:	

and :

SOUTHERN INDEPENDENT SCHOOL :
ASSOCIATION, :

Intervenor- :
Defendant. :

MEMORANDUM OPINION AND ORDER

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958, Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956, Fairfax-Brewster commenced operation of a summer day camp and in 1967, Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70, when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a

medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2-year-old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the

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[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were conslidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly, the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. §

1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra,* at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* [Emphasis added.] *Sullivan v. Little Hunting Park,* 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the Opportunity to attend these schools was open to every white child. *Tillman,* at 4313 and 4314. It is difficult to accept the defendants 'argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.*, was cited to the contrary as an

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[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly, the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a, *et seq.*, it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, Sullivan v. Little Hunting Park has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

---

[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL C. McCRARY, *et al.*, *Plaintiffs,*	
v.	**CIVIL ACTION No. 495-72-A**
RUSSELL L. RUNYON, *et al.*, d/b/a BOBBE'S SCHOOL, *Defendants,*	
and	
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Intervenor-Defendant.*	

[Filed September 24, 1973]

SUPPLEMENTAL TO MEMORANDUM OPINION AND ORDER DATED JULY 27, 1973

1. The counterclaim of intervenor is dismissed for failure to state a cause of action.

2. The proffered testimony of intervenor described on page 8 of said Memorandum Opinion was admitted into evidence subject to the Court's reserved ruling on relevance.

3. Intervenor shall furnish the Clerk with the names of the schools in the component associations of the Southern Independent School Association within 30 days.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
Albert V. Bryan, Jr.
United States District Judge

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ John Edmond Cox
John Edmond Cox
Deputy Clerk

Alexandria, Virginia
September 24, 1973

Supreme Court, U. S.
FILED
NOV 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,

Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, etc., *et als.*,

Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, *et al.*,

Defendants.

SUPPLEMENTAL BRIEF OF PETITIONER

Acting pursuant to Rule 24(5) of the Rules of this Court, petitioner calls the attention of the Court to the following intervening matters affecting the statements made in the third and fourth paragraphs of the "Jurisdiction" section in its petition, (p. 2):

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

BRIEF OF PETITIONER SOUTHERN INDEPENDENT SCHOOL ASSOCIATION

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IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. MCCRARY, INFANT BY CURTIS L. MCCRARY AND SANDRA MCCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

BRIEF OF PETITIONER SOUTHERN INDEPENDENT SCHOOL ASSOCIATION

To the Honorable the Justices of the Supreme Court of the United States:

Pursuant to your grant of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter, the above named petitioner,

herein referred to as SISA, submits its brief on the merits and prays a reversal of the said judgment and reinstatement of its counterclaim.

OPINIONS BELOW

The majority and minority *en banc* opinions of the Fourth Circuit Court of Appeals on the merits and its opinion denying rehearing, are officially reported at 515 F.2d 1082 *et seq.* and have been reprinted in the consolidated Appendix starting at page A. 4. The opinion and order of the United States District Court for the Eastern District of Virginia, Alexandria Div. (Bryan, J.) is reported at 363 F. Supp. 1200 and has also been reprinted with its two supplements in the Appendix at page A. 133.

JURISDICTION

The judgment below was entered on April 15, 1975 and rehearing was denied with opinion on May 29, 1975. SISA's petition for review by writ of certiorari was filed in this Court on August 22, 1975 and was granted on November 11, 1975. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

The Court of Appeals, pursuant to 28 U.S.C. § 2403, has certified to the Attorney General that the constitutionality of 42 U.S.C. § 1981 may be drawn into question in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. XIII.

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1981. Equal rights under the law.

> All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

QUESTION PRESENTED

Does 42 U.S.C. § 1981 compel desegregation of private schools?

STATEMENT OF THE CASE

Proceedings Below

In the District Court two Negro minors alleged an appropriate level of scholastic competence and prayed relief for the asserted refusal to admit them on racial grounds to defendants' allegedly white private school in Arlington (A. 95). The complaint asserted that admission to any private school constitutes a "contract" within the meaning of that term as used in 42 U.S.C. § 1981 (A. 95) and consequently any racial limitation on private school admission was a denial to them and their class of the same right "to make and enforce contracts . . . as is enjoyed by white citizens" (A. 95).

These allegations and assertions were denied by the answers, (A. 99-101).

SISA, an association of six state organizations of non-profit private schools—some of which are conceded to have racial limitations on admission—was allowed intervention by the District Court, (A. 129). By answer SISA denied that § 1981 conferred on the infant plaintiffs a right of compulsory admission to any private school (A. 125).

By counterclaim, SISA alleged the absence of any state action in the establishment or operation of its schools and that admission to such schools was based on the subjective approval of each applicant by officials of the school. SISA further alleged that its schools had attained an academic proficiency well above that of the local public schools and that such schools had few disciplinary problems, asserting that these conditions were the result of limiting school attendance to a single homogeneous group (A. 126-128).

In proof of these allegations SISA first stipulated with plaintiffs as follows:

> 1. A substantial proportion of the schools represented by intervenor deny admission to applicants of the Negro race.
>
> 2. The schools represented by intervenor admit applicants only in the discretion of the school authorities.
>
> 3. The schools represented by intervenors are privately owned, financially supported by tuition paid by the parents of the students and, in some cases, supplementary private gifts.
>
> 4. The schools represented by intervenors are located in areas having cost-free, desegregated public education available to all children, and the parents of the students in schools represented by intervenors

are taxpayers who pay their proportionate share of federal, state and local taxes for the maintenance of such public system of education.

5. The sole basis of jurisdiction asserted by plaintiffs in this action is 42 U.S.C. § 1981. (A. 131).

SISA also produced two school officials to testify that its private schools were achieving demonstrably higher academic levels than the public schools of their area and had few or no disciplinary problems (A. 226a) and offered the testimony of a university professor to show first, that this would be the normal expectation when teaching to students having common self-identity and learning patterns and second, that in the light of current controversies about educational methodology, the selection of a limited admission school was not an irrational choice (A. 149-153) by these parents. This testimony and the supporting exhibits were admitted by the District Court subject to reserving its ruling on an objection to relevance. No evidence to the contrary was offered.

On the basis of its counterclaim and proffer of evidence, SISA prayed for a counter-declaration of the Constitutional right of any parent to select a private school expressing the parent's educational beliefs or individual philosophy (A. 128).

On July 27, 1973, after trial, the District Court ruled that the defendants' school had excluded the infant plaintiffs some three years earlier by reason of their race and that an infant plaintiff had in the interim been admitted to a private integrated school of his choice in the Washington area and was doing well. (A. 136)

On the law, the Court ruled that under this Court's *Tillman* decision (*infra*), 42 U.S.C. § 1981 was applicable to private as well as state-enforced discrimination, that in any event the defendant school was not "truly private" since it was "open to every white child," and

therefore admission to a white private school was a right to "contract" within the intendment of § 1981. The Court further held that since § 1981 was limited in terms to rights ". . . enjoyed by white citizens," its prohibitions would not be applicable to bar racial discrimination by non-white races or by private all-Negro, all-Chinese or rabbinical schools (A. 139). The Court denied class representation by any party (A. 138).

By its order the District Court granted plantiffs' requested declaration that racial discrimination in white private school admissions violates § 1981 (A. 141). It held SISA's evidence of the scholastic value of segregation in education was irrelevant under this Court's ruling in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) and accordingly dismissed SISA's counterclaim for failure to state a cause of action (A. 132a).

The District Court enjoined the defendant school and all private schools associated with SISA from denying admission to Negro applicants (A. 141-142) and awarded damages (A. 142).

An appeal was taken by SISA to the Fourth Circuit Court of Appeals from the District Court's dismissal of its counterclaim and its correlative declaration of a statutory right in the Negro plaintiffs to compel admission to private white schools.

The appeal was heard *en banc* on April 2, 1974. The decision of the Fourth Circuit was issued on April 15, 1975. Four of the seven judges affirmed the holding of the District Court, citing *Jones* v. *Mayer*, 392 U.S. 409 (1968), *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969) and *Tillman* v. *Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973) as binding precedent requiring such a result.

> As an intellectual exercise, the historical reading and interpretation of the majority in *Jones* v. *Mayer*

> may be debatable . . . That reading and interpretation was followed in *Sullivan* v. *Little Hunting Park* and in *Tillman* v. *Wheaton-Haven*, however, and, for us, is firmly established.
>
> 515 F.2d 1082, 1087 (A. 12).

The majority opinion further denied that the issue had been previously determined by this Court in *Norwood* v. *Harrison*, 413 U.S. 455 (1973). The opinion then concluded

> Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.
>
> 515 F.2d at 1087-88 (A. 14).

In the Court of Appeals three judges dissented on the ground that the question was "one of first instance in any federal court at this or higher level," (A. 25) that *Jones*, *Sullivan*, and *Tillman* were not controlling since they dealt with rights in real property under § 1982, and that the right to make contracts "does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (A. 26). The dissenters further argued that the overriding issue of public policy was the right of association of the parents as described by this Court in "*Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974)" (A. 26). The minority then concluded:

As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 U.S.C. § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood* v. *Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged was neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

515 F.2d at 1096-97 (A. 34).

From the ruling of the Fourth Circuit, all parties filed petitions in this Court for review by writ of certiorari. The petitions were granted on November 11, 1975 and consolidated for argument with companion cases (Nos. 72-62, 75-66, 75-306). Pending final deter-

mination of the issue by this Court, the Court of Appeals has stayed enforcement of the order of the District Court (A. 44a, b).

SUMMARY OF ARGUMENT

I

The application of the 1866 Civil Rights Act to restrain acts of private discrimination perpetuating badges or incidents of slavery starts with the decision of this Court in *Jones* v. *Mayer* in 1968. But the majority judges of the Fourth Circuit Court of Appeals were in error in holding that ruling and the related decisions in *Sullivan* and *Tillman*, compelled an interpretation of § 1981 to bar discrimination in private school admissions. *Jones*, *Sullivan* and *Tillman* were concerned only with the denial to blacks of the unrestricted acquisition and use of real property under § 1982, an historic disability recognized as one of the badges of slavery.

II

The District Court and the Fourth Circuit majority were also in error in holding that the issue now presented had not previously been considered by this Court in *Coit* v. *Green*, *Norwood*, and *Gilmore*, sustaining the right of these private schools to retain their existing admission policies.

III

To the extent that the question may still be open, SISA argues that the phrase "equal benefit of all laws" makes § 1981 inapplicable to private school admissions either in words or by purpose. Contract law has always required acceptance as well as offer and under the law no "white person" has ever had a right to compel a truly private organization to admit him to membership.

IV

The reading of § 1981 given by the Fourth Circuit would create a direct conflict between the freedom of association of parents under the First Amendment to select schools of their choice for their children on the one hand and, on the other, the direction to eliminate badges and incidents of slavery pursuant to Congressional authority granted under the Thirteenth Amendment. In any such conflict the Bill of Rights provisions would prevail.

V

The growing weight of decision distinguishing between religious and racial selectivity as "good" and "evil" forms of discrimination, denies to parents their fundamental constitutional right to be free of judicial value judgments on the rightness of their beliefs, contradicts the evidence in the record, and opposes national policy favoring a pluralistic society.

ARGUMENT

I

Your Decisions in *Jones*, *Sullivan* and *Tillman* are Not Determinative on the Interpretation of § 1981. Those were Rulings on § 1982 Real Property Rights

In *Jones* v. *Mayer* this Court took note that only state-supported discrimination had been prohibited by the Fourteenth Amendment. But you further held that the delegation of authority given to Congress by the second paragraph of the Thirteenth Amendment was adequate to support legislation directed against forms of individual discrimination which had historically been a "badge or incident of slavery." On the basis of your reconsideration of the legislative history of the 1866 Civil Rights Act, you concluded that the 42 U.S.C.

§ 1982 had been intended by Congress for this purpose and was therefore applicable to prohibit private racial bias burdening the right of blacks to purchase an unrestricted title in real property. This view was adhered to in your subsequent decision in *Sullivan* v. *Little Hunting Park, Inc., supra.*

In dissenting from the opinion of the District Court and the majority in the Court of Appeals, the minority judges of the Fourth Circuit said that this same question of property right was the basis for your *Tillman* opinion. SISA concurs. The complaint in *Tillman*—as in *Jones*—did make reference to § 1981 as well as § 1982 and this could be a reason why the Courts below cited your *Tillman* holding as compelling an equally broad reading of the "contract" phrase in § 1981. But your holding was not to that effect. On its facts, *Tillman* was a § 1982 case and dealt—as had *Jones* and *Sullivan* —with the scope of rights which a black purchaser would acquire as part of a purchased real property interest.

> When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area.
>
> . . .
>
> We hold, as a consequence, that *Wheaton-Haven* is not a private club and that it is not necessary in this case to consider the issue of any implied limitation of the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000 a(3), is under consideration. Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed. 2d. 627 (1972); Daniel v. Paul, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed. 318 (1969).
>
> 410 U.S. 437, 438-9, 93 S.Ct., 1090, 1094 (1973).

And on the *Tillman* remand, the District Court confirmed that the action so taken by this Court was based

on the property clause in § 1982, 367 F. Supp. 860 (D. Md. 1973). This was equally the view of Judge Hodges in *Riley* v. *Adirondack School for Girls*, 368 F. Supp. 392, 396-7 (M.D. Fla. 1973).

Accordingly it is SISA's position that the holdings of this Court in *Jones*, *Sullivan*, and *Tillman* on the application of the 1866 Act to incidents of private discrimination perpetuating badges or incidents of slavery by restricting real property interests, are not controlling precedent requiring in addition that the contract phrase of § 1981 be made applicable to forbid parental discrimination in private school selection.

II

This Court Has Previously Held That The Private White Schools of SISA Constitute a Permissible Expression of the Parents' Freedom of Association

If *Jones*, *Sullivan*, and *Tillman* are not controlling, is the issue a *tabula rasa* as the Court of Appeals minority held? SISA says "No".

The constitutional freedom of parents to associate their children in SISA schools was necessarily decided by this Court in three cases which involved differing questions of state assistance. SISA schools were denied use of free state textbooks in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), refused the otherwise customary use of public athletic grounds in *Gilmore* v. *City of Montgomery, Alabama*, 417 U.S. 556 (1964), and had their educational tax exemptions withdrawn in *Coit* v. *Green*, 404 U.S. 907 (1971) (*aff'g. per curiam Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971).

In *Norwood* (p. 469) it was held

> The private school that closes its doors to defined groups of students on the basis of constitutionally

> suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

In *Gilmore* you ruled that "private segregated school groups" should not be given exclusive use of city owned recreational facilities on the same basis as others, but saying also (417 U.S. at 575)

> We close with this word of caution. It should be obvious that the exclusion of any person or group—all-Negro, all-oriental, or all-white—from public facilities infringes upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in *Moose Lodge*. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180, 92 S.Ct., at 1975. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change.

The three-judge opinion which was summarily affirmed by this Court in *Coit* v. *Green*, stated of these SISA schools,

> The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the constitutionally protected right to belong to political groups

> embracing both legal and illegal aims so long as one does not intend to engage in acts in furtherance of their unlawful purposes. Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966). "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 415, 444-445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963).
>
> Neither plaintiffs' prayers nor defendants' policy seeks to stop intervenors from sending their children to segregated private schools at their own expense, paying the full cost of education at such schools.
>
> 330 F. Supp. 1150 at 1166, *aff'd. per curiam* 404 U.S. 997, 92 S.Ct. 564 (1971).

SISA points out that in each of these decisions the constitutionality of the continued association of children in these segregated private schools of SISA was an essential predetermination to the actual holding. Thus, while SISA necessarily concedes that none of the judges below have agreed with this reading of these opinions, it is still the position of SISA that the issue now presented to this Court has previously been determined not once, but on three separate occasions.

III

In Any Event § 1981 Does Not Extend to Private School Admissions Either by Language or Purpose

It is a hornbook rule of statutory construction that statutes should be read to avoid the raising of substantial constitutional questions, *Lynch* v. *Overholser*, 369 U.S. 705, 708, 82 S.Ct. 1063, 1067 (1962), *Green*

v. *Connally, supra.* And that a federal statute must be read within the constitutional powers granted to Congress, *Powell* v. *McCormack*, 395 U.S. 486, 506, 39 S.Ct. 1944, 1956 (1969), *Grosjean* v. *Amer. Press Co.*, 297 U.S. 233, 56 S.Ct. 444 (1936), *United States* v. *Brignoni-Ponce*, —— U.S. ——, 95 S.Ct. 2574 (1975).

Therefore, any present resolution of an asserted conflict of constitutional right between the First and Thirteenth amendments is unnecessary unless and until it is first held that in the words of § 1981 a denial of private school admission on any ground denies a right to "make and enforce contracts" which is possessed by other citizens of whatever color, religion, sex or national origin. SISA denies that such a right exists under this language or has ever existed in the law as a badge or incident of slavery or otherwise.

SISA must of course accept the legal definition of the relationship between any private organization and its dues or tuition paying members as a "contract". Virtually every event in life which involves personal discriminatory expression, from marriage to the taking of holy orders, is contractual in some legal sense. Given the ubiquity of the "contract" concept, any reading of § 1981 as applicable to every legal relationship would make it a Pandora statute reversing the most fundamental prerequisites of accepted contract doctrine.

But if the statutory "contract" phrase in § 1981 means less than all the transactions viewed by the law as "contracts", how may the limitation be defined judicially? The Fourth Circuit minority suggested the use of a division on the basis of "primary" and "secondary" relationships (A. 31-32). But SISA would argue that this is unnecessary since any of the three standard methods of statutory interpretation would suffice for the purpose; first by simply reading the statutory language for its plain meaning, "the *same right* . . . to make and en-

force contracts . . . as is enjoyed by white citizens . . .". If any ambiguity remains then, second, by reading the phrase in the light of the statute's apparent purpose, and if finally required, by looking to the specific Congressional intent in passing the law. In the view of SISA the "contract" phase in § 1981 would not extend to discrimination in private school admissions under any one of these three tests.

A. *A Private Contract Requires the Assent of Both Parties*

The District Court granted to plaintiffs the right to compel the making of an agreement by an unwilling private contractor. That is a power which the law neither now nor at any known time in the past has recognized as coming within the meaning of the word "contract". Granting that public offers of reward as well as adhesion contracts may raise occasional questions of the identity of the offeree or the actuality of the acceptance, neither is involved here.*

The pre-condition of the law of contracts in 1866 and today is that acceptance as well as offer must be shown to exist, that a "contract" is a consensual agreement of the parties rather than a power in one to constrain the other. This principle was noted in a Fifth Circuit case arising under the contract phrase of § 1981 in denying a similar claim of power to compel acceptance.

> In short I would say that the "offer" for a unilateral "contract" communicated by the Advertiser is an offer to publish on such terms as it sees fit. It is an offer to exchange only an unenforceable promise to publish. Black citizens then have "the same right

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* And it may be that references by both Courts below outside the record as to the defendant schools being generally open to the public was intended to meet this difficulty, but at best such a conclusion would have no relation to the non-profit SISA schools which by stipulation admit applicants only in the discretion of the school officials.

> . . . to make and enforce contracts . . . as is enjoyed by white citizens." Neither white citizens *nor* black citizens form enforceable contracts of publication with the Advertiser.
>
> *Cook* v. *The Advertiser Co., Inc.*, 458 F.2d 1119, 1124 (5 Cir. 1972, Wisdom, J., concurring.)

B. *Group Membership is Such a Contract*

One application of this general contract principle is by denying claims of right to compel admission to any private organization. We start with the general rule as given in 6 *Am. Jur. 2d* 443 (Assn's and Clubs, § 18):

> Membership in a voluntary unincorporated association is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. The grant or refusal of membership is within the complete control of the association, and the courts cannot compel the admission of an individual into such an association. If his application is refused, he is entirely without legal remedy no matter how arbitrary or unjust may be his exclusion.

In *Sims* v. *Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972) the contract clause of § 1981 was invoked and the power to compel membership was denied

> If the U.C.T. is in fact a private fraternal order, the availability of inexpensive life insurance being a mere incident or benefit of membership therein, plaintiffs' grievance is based not on defendants' refusal to sell them insurance but rather on defendants' refusal to admit them to membership. And if this is the case, we know of no authority for the proposition that membership in a private organization may be secured by suit under the civil rights statutes.
>
> (343 F. Supp. at 113-114)

Accord, Moose Lodge No. 107 v. *Irvis, supra, MacDonald* v. *Shawnee Country Club, Inc.*, 438 F.2d 632 (6th Cir.), *cert. denied* 403 U.S. 932 (1971), *Wesley* v. *City of Savannah, Ga.*, 294 F. Supp. 698 (S.D. Ga. 1969), *Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), *Chapman* v. *American Legion*, 244 Ala. 553, 14 So.2d 225 (1943), *Dockers' Club, etc.* v. *Race Relations Bd.*, (Hse. of L.) 3 W.L.R. 533 (1974).

Although an exception appears to exist with regard to membership in certain professional societies, in each case it can be shown that the society in question acted as an agency of its state in fixing professional qualification, or in law had exclusive access to limited commercial opportunities, *Goshorn* v. *Bar Assn. of District of Columbia*, 152 F. Supp. 300 (D. D.C. 1957); *Medical Society of Mobile County* v. *Walker*, 245 Ala. 135, 16 So.2d 321 (1944); *Eaton* v. *Bd. of Managers of James Walker Memorial Hospital*, 261 F.2d 521 (4 Cir.), *cert. denied* 359 U.S. 984 (1958); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (9 Cir. 1963), *cert. denied* 376 U.S. 938 (1963); *Hawkins* v. *N. Car. Dental Soc*, 355 F.2d 718 (4 Cir. 1966); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971) *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), 366 U.S. 36 (1961), and *Arnstein* v. *Amer. Soc. of Composers, Authors, etc.*, 29 F. Supp. 388 (S.D. N.Y. 1939).

This division of result occurs also with respect to membership in school associations. In *State of North Dakota* v. *North Central Ass'n., etc.*, 23 F. Supp. 694 (E.D. Ill.) *aff'd.* 99 F.2d 697 (7 Cir. 1938), exclusion from an association of colleges was held to be *damnum absque injuria*,

> In the absence of a breach of law a chancellor is powerless to compel admission by or into such an Association and if one's application is refused, it is equally without power to grant relief.
>
> (23 F. Supp. at p. 700)

To the same effect was the decision in *Parsons College* v. *No. Central Ass'n of Colleges and Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967) even though the defendant Association had been granted certain accreditation rights.

> The Court of Appeals for this Circuit has similarly declared that no judge-made principles or statutes are to be applied to control the actions of private associations.
>
> (271 F. Supp. at p. 71)

On the other hand where federal financial benefits were dependent on association membership, admission could be made compulsory, *Marjorie Webster J.C.* v. *Middle States Assn. of Coll. and Sec. Sch.*, 432 F.2d 650 (D.C. Cir.), *cert. denied* 405 U.S. 979 (1970). Schools fall into the same category and are private, not public, absent some overriding state relation, *Weise* v. *Syracuse Univ.* 522 F.2d 397 (2 Cir. 1975), *Powe* v. *Miles*, 407 F.2d 73 (2 Cir. 1968), *Grossner* v. *Trustees of Columbia University in the City of N.Y.*, 287 F. Supp. 535 (S.D. N.Y. 1968), *Browns* v. *Mitchell*, 409 F.2d 593 (10 Cir. 1969), *Brownley* v. *Gettysburg College*, 338 F. Supp. 725 (M.D. Pa. 1972), *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970) *aff'd. per curiam* 445 F.2d 412 (7 Cir. 1971), *Torres* v. *Puerto Rico Junior College*, 298 F. Supp. 458 (D. P.R. 1969).

The absence of any recognized form of state action affecting its schools was alleged and proven by SISA in the District Court, *supra*, p. 4. Hence, if compulsory admission to private organizations is denied by contract law generally applicable to "white citizens", then such a right is equally absent from the meaning of the word "contract" as used in Sec. 1981.

C. *The Statutory Purpose of the 1866 Act was to Equate the Rights of All Citizens, not to Create New Contract Law*

This Court has held that a principal purpose of the Thirteenth Amendment was to maintain a free and voluntary system of labor, *Pollock* v. *Williams*, 322 U.S. 4 (1954); *Taylor* v. *Georgia*, 315 U.S. 25 (1942) eliminating the legal incidents of both slavery and other forms of peonage. As the unanimous Justices of 1883 explained it

> It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.
>
> *Civil Rights Cases*, 109 U.S. 3, 22, 3 S.Ct. 18 (1883)

On slavery, the details of the passage of the 1866 Act under the second paragraph of the Thirteenth Amendment were analyzed by this Court in *Jones* v. *Mayer*. There, as previously noted, you held that the intent of the 1866 Congress was to grant all citizens the "same" right, to forbid those acts of private discrimination which tended to perpetuate legal disabilities which were recognized badges or incidents of slavery.

To find what incidents of slavery were intended to be covered by the 1866 Act, this Court in *Jones* put particular reliance on the Congressional history of that legislation.

Applying the same analysis to the present issue, what is clear is that Congress did not express any intention

to amend existing contract doctrine but rather to give all "inhabitants"

> ". . . the same right to make and enforce contracts, . . ."
>
> (Cong. Globe, Jan. 12, (Senate No. 61) in January, 1866, Senator Trumbull 1866, S. p. 211)

In later versions "inhabitants" became "all persons" and the rights granted were first those of any citizen, later "white" citizens. Congressman Wilson pointed out that he had himself made this last change in the language of the bill

> ". . . to operate as a limitation and not as an extension; . . ."
>
> (Cong. Globe Appx. Mar. 8, 1866, p. 157)

In short, the legislative history of the 1866 Act is clear that its ultimate form was arrived at to *equate* all persons in the existing rights of an adult male citizen, not to grant preferential powers to any group. Therefore, the contract law applicable to "white citizens" in 1866 was the law intended to be applicable to "all persons" thereafter and did not increase or change the position of any person as a potential contractor.

D. *Specifically, The 1866 Congress Did Not Intend the Contract Clause to Apply to School Admissions*

As a general matter the legislative references in point here have been collected by counsel for the petitioner Fairfax-Brewster School (No. 75-66) and the citations are given in that brief. For present purposes, we take a single example, a statement by the Floor Manager for the legislation, Congressman Wilson, whose views were regarded as authoritative by this Court (392 U.S. 409, 425). Wilson told the 1866 Congress that the "contract" language of Section 1981 would not require school integration;

> This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities". What do these terms mean? Do they mean that in all things civil, social, political, all citizens without distinction of race or color, shall be equal? By no means can they be so construed. . . . Nor do they mean that all citizens shall sit on the juries or that their children shall attend the same schools. These are not civil rights or immunities." (Cong. Globe 1866, Mar. 1, p. 1117)

* * * *

Neither by language, legal implication, nor Congressional intendment was the 1866 Act made applicable to private school admissions. Accordingly, there is neither a Constitutional conflict or even a Constitutional question in this case. And in case of doubt, it has been the often repeated direction of this Court to interpret any statute to avoid Constitutional questions, *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 351 (1937); *Crowell* v. *Benson*, 285 U.S. 22, 46, 62 (1932); *Grenada County* v. *Brown*, 112 U.S. 261, 269 (1884); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, 274 (1940); *Driscoll* v. *Edison Light & Power Co.*, 307 U.S. 104, 115 (1939); *Stephenson* v. *Binford*, 287 U.S. 251, 277 (1932).

IV

If § 1981 Does Authorize Private School Desegregation, The Statute is in Such Part Unconstitutional

If the admission policy of SISA schools exists as an expression of First Amendment rights of association of the parents, then the 1866 Act is void except to the extent that a diminishing of the freedoms preserved by the Bill of Rights is directly required under the Thirteenth

Amendment. SISA argues that no such direction was contained in or implied by the Thirteenth Amendment and the rulings below are therefore in error in extending the contract phrase of § 1981 to include private school admissions.

1. We start with the First Amendment rights of association, a fundamental liberty conceded to exist with respect to parents by all eight judges in the courts below. This right of association protects organizations furthering racially motivated policies, *NAACP* v. *State of Alabama*, 357 U.S. 449 (1958), *NAACP* v. *Button*, 371 U.S. 415 (1963), *Gibson* v. *Florida Leg. Investig. Comm.*, 372 U.S. 539, 546 (1963), *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), and although all such cases exemplify the freedom in black association, the decisions are clear that the rule would apply to whites as well as blacks. As said in *Button*

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, political or religious affiliation of the members of the group which invokes its shield, or to the true popularity, or social utility of the ideas and beliefs which are offered.
>
> (371 U.S. at pp. 444-5)

As the *Green* Court noted, popularity of opinion is not required. Association is permitted for the peaceful advocacy of anti-constitutional or even illegal ends, *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238 (1966) to retain communists in defense security positions, *U.S.*

v. *Robel*, 389 U.S. 252, 88 S.Ct. 419 (1967), and federally subsidized shipping, *Schneider* v. *Smith*, 390 U.S. 19, 88 S.Ct. 682 (1968), to favor a political dictatorship, *Schneiderman* v. *U.S.*, 320 U.S. 118, 63 S.Ct. 1333 (1943), or the establishment of a Nazi state, *U.S.* v. *Korner*, 56 F. Supp. 242 (S.D. Cal. 1944), *National Socialist White Peoples Party* v. *Ringers*, 473 F.2d 1010 (4 Cir. 1973), to oppose national policy or law, *Bond* v. *Floyd*, 385 U.S. 116, 87 S.Ct. 339 (1966), or to teach racial supremacy, *Cooper* v. *Pate*, 382 F.2d 518 (7 Cir. 1967). The Grand Wizard of the Ku Klux Klan could not be denied public employment because of his racial beliefs, *Murray* v. *Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971), separate education for men and women is permissible where coeducational facilities are also available, *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd.* 401 U.S. 951, 91 S.Ct. 976 and sex-exclusive private associations are valid despite government funding or commercial activity, *The New York City Jaycees, Inc.*, v. *The United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975), *Kiwanis Club of Great Neck* v. *Kiwanis International*, 374 N.Y.S. 2d 265 (1975).

Such freedom of association may not be discouraged whether it be ultraconservative or ultraliberal, *Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489 (D.C. Cir. 1968). In that decision the now Chief Justice took occasion to say

> . . . programs of "political education" some of which contain overtones of anti-semitism and racism . . . however reprehensible, are within the areas covered by the First Amendment.

Or, as expressed in one of the famous dissents of Justice Holmes, since become the doctrine of the Court,

> If there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free

> thought for those who agree with us but freedom for the thought that we hate. *U.S.* v. *Schwimmer*, 279 U.S. 644, 49 S.Ct. 448 (1929)

In applying this doctrine to non-public schools the quotations given above in Point II from the *Norwood* and *Green* decisions describe and reference the constitutional character of the right of all parents to send their children to schools of their choice—a freedom to find an expression of their beliefs through association of their children in particular schools. That parental right was reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965), where, in relying on *Pierce* v. *Society of Sisters/Hill Military Academy*, 268 U.S. 510, 45 S.Ct. 571 (1925), First Amendment freedoms were defined to include:

> . . . the liberty of parents and guardians to direct the upbringing and education of children under their control.
>
> . . .
>
> The right to educate a child in a school of the parents' choice—whether public or private or parochial—. . . to study any particular subject or any foreign language . . . to express one's attitudes or philosophies. . ." (381 U.S. at pp. 482-83)

Adherence to First Amendment standards is of particular importance where schools are involved,

> The classroom is peculiarly the "marketplace of ideas."
>
> *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967)

Accord, Tinker v. *Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969).

The *Pierce* principle applies to racial groups. Back in 1927 this Court said

> The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.
>
> *Farrington* v. *Tokushige*, 273 U.S. 284, 298 (1927)

The underlying rationale of *Pierce* was explained in *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 242, 83 S.Ct. 1560, 1582 (1963), quoted above in part from the decision of the *Green* Court.

> Attendance at public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experience of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent." (Brennan, J., concurring)

If the SISA parents have a right to select a school for their children that expresses their own preferences and

beliefs, is that right invaded by the decisions below? Clearly so. Every parent who selects a SISA school because of a belief that "segregation is desirable in education" has lost any opportunity of expressing that belief if by the Thirteenth or any other amendment all public or private schools must become desegregated. The rulings below therefore diminish the *Pierce* right of these parents, limiting their right to associate for the practical expression of their beliefs.

2. Does the Thirteenth Amendment purport to diminish *Pierce* rights? Certainly not in words or in its statutory extension as noted above in Point III. Nor, as three judges below have pointed out, is such an implication mandated by anything stated in the decisions of this or any lower court. In short there does not apear to be any implied, much less necessary, conflict between the two.

3. But if we assume *arguendo* that such a conflict does arise, the resolution would still favor the preservation of First Amendment liberties to all people regardless of race. Personal liberties preserved by the Bill of Rights are "preferred" over other rights deriving from the Constitution, *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946), *Griswold* v. *Connecticut*, *supra*. Moreover,

> The Constitution is concerned with practical substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning.
>
> *Fed. Housing Admin.* v. *Darlington*, 358 U.S. 84, 91 (1958).

This principle is fully applicable here. These plaintiffs plainly have a *Pierce* right through their parents to select an integrated or racially segregated school of their choice, public or private in the first case, private in the second. But the decisions below give them an added right, to compel the desegregation of other private schools. Given the alternatives available to every parent, this is not a

practical or substantial right but rather is one asserted here for the purpose of bringing this action.

To the contrary, the *Pierce* rights of the SISA parents are necessarily substantial, since, unlike the plaintiffs here, they have no alternative method of expressing their particular beliefs. Therefore even if we assume the existence of a conflict between the First and Thirteenth Amendments, the liberties of the Bill of Rights would still be preferred and § 1981 would be void to the extent that it purported to diminish them.

V

The Constitution Contains No Double Standard For Right or Wrong Types of Belief

The cases show no lack of judicial recognition of the freedom of conscience of the individual and his right to an opportunity for its reasonable expression. A state cannot forbid the teaching of whatever foreign language, *Bartels* v. *Iowa*, 262 U.S. 404 (1923) or the theory of evolution, *Epperson* v. *Arkansas*, 390 U.S. 941 (1968) even in its public schools. Rights cannot be taken regardless of how ethnic the associated belief may be, *Cooper* v. *Pate*, *supra*, at 521, *Kotohira Jinsha* v. *McGrath*, 90 F. Supp. 892 (D. Haw. 1950), nor may a court evaluate political acceptability of belief, *Healy* v. *James*, 408 U.S. 169 (1972), *Bachellar* v. *Maryland*, 397 U.S. 564 (1970).

In *Griswold*, *supra*, you cited *Button* to the effect that an association to advance the "social, legal, and economic benefit of the members" of a single race was a protected activity (381 U.S. 479, 483 (1965)) and in *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) you said,

> If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred

> position in our basic scheme. *Schneider* v. *State*, 308 U.S. 147, 60 S.Ct. 146, *Cantwell* v. *Conn.*, 310 U.S. 296, 60 S.Ct. 900.

But such a distinction of "right" and "wrong" thinking is nevertheless growing in the courts today, reviving the practice of distinguishing between Constitutional rights on the basis of a judicial moral evaluation of the type of discrimination involved—which in the usual case regards racial segregation as "by far the most evil form . . ." *Weise* v. *Syracuse Univ.*, *supra* at 406; *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968).

> Moreover, we have recognized a "double standard" in state action—"one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims," *Jackson* v. *The Statler Foundation*, 496 F.2d 623, 629 (2d Cir. 1974)
>
> *Weise* v. *Syracuse Univ.*, *supra*, p. 405.

To put private beliefs into "good" or "evil" categories directly denies the basic freedom here contended for and returns to the emotional form of legal thought which at one time in our history sustained the Alien and Sedition Acts. Yet, in one form or another popular antipathy to this particular belief is found in many decisions often rationalized as interpretations of undefined legal concepts such as "state action", "equal protection" or even § 1981 itself.

For example, the Court below ruled,

> Among private schools, [parents] are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants *on the basis of neutral principles*, may not exclude on the basis of race. (A. 14) (*Emphasis added*)

What are "neutral principles"? Clearly a distinction by race is not. Or is a principle "neutral" if any but the white race is meant—as the District Court has here held?

To take an example, both Courts below have referred to your *Sullivan* decision as holding that there could be no such thing in law as "private" discrimination if there is "no plan or purpose of exclusiveness other than race" (A. 15, 139). As SISA reads the *Sullivan* decision the comment given below was improperly lifted out of context, and would be directly contradicted by *Moose Lodge* v. *Irvis, supra*, but it illustrates the adoption of a principle of regarding racial belief as peculiarly evil.

In the opinion of SISA, this judicial rejection of any private belief in the values of white ethnic association follows from press stereotypes which have risen to the status of a legal fiction requiring Courts to refuse to consider any evidence which might refute it, a rejection usually—if mistakenly—justified by unspecific reference to your decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (A. 133).

But if such evidence were received it would be seen that the attitude so expressed by the Courts is wrong in law and wrong on the facts.

A. *Private Schools*

Private schools for selective groups both religious and secular appear to have always been a part of education, Kramer, S.N. *From the Tablets of Sumer* p. 5 (Falcon Press, Colo. 1956). The most recent government publication on the subject is apparently HEW publication OE 74-11420 "Statistics of Non-public Elementary and Secondary Schools, 1970-71". This publication lists 16,453 private schools in the United States (Table C, p. 6) enrolling 10% of the nation's school population (Table ii, p. 28). This enrollment includes a quarter million Negro children (Table 27, p. 71), comprising 4.8% of the number of all children attending in private schools (Table 26, p. 70).

In the Southeast region where the SISA schools are located, the publication lists 2,355 private schools (Table C, p. 6) enrolling 6.1% of the local school population (Table ii, p. 28). This enrollment includes 52,522 Negro children (Table 27, p. 71) or 8.2% of the regional registration (Table 26, p. 70). Or, if we take all minorities in the Southeast, they are 29.2% of the public school enrollment and 11.6% of the private school enrollment (Table L, p. 16).

Of our national total of 16,453 private schools as given by OE 74-11420, 14,270 or 86% are shown as church-affiliated (Table C, p. 6). Private schools grouped by race, sex, or national origin are not separately tabulated by HEW and are difficult to identify. But they do exist. This Court referred to "163 [Asiatic] foreign language schools" in Hawaii, *Farrington* v. *Tokushige*, *supra* at pp. 290-291. In that State we could add the Kamehameha schools which require a showing of Hawaiian ancestry for admission. HEW lists 20,968 Native American Indians enrolled in private schools (Table 27), presumably a total which does not include the publicly-financed all-Indian reservation schools.

All-Negro schools have been occasionally mentioned. Apart from whatever number of Black Muslim schools may exist, twelve all-Negro private schools in Mississippi were identified by a Rev. Jas. D. Gilbert (Dep. Jan. 30, 1970, Exh. 1) in *Green* v. *Kennedy*, *op. cit.* Similar schools in Pennsylvania were described at pp. 49-51 of the appellant's brief in *Lemon* v. *Kurzman*, 403 U.S. 602, (1971).

A random selection of 100 other special purpose tax exempt educational organizations out of 33,000 listed by the Internal Revenue Service, was filed by SISA in the District Court (A. 168-172).

Many, possibly most, private schools are racially integrated. The Council for American Private Education,

which includes a "Southern Association of Independent Schools", was granted leave to file a brief *amicus* in the Court below (R. Vol. V, p. 16) claiming membership of 734 secular private racially integrated schools (p. 1) of which 138 (p. 2) were said to be located "in the same area of the country as the schools which are affiliated in [SISA]" (p. 13).

Classifying any private school as either ethnic or religious is ambiguous in itself. The *amicus* brief of the National Jewish Commission on Law and Public Affairs, June 16, 1970 filed in *Green* v. *Kennedy*, (*Coit* v. *Green*) D.D.C., Civ. No. 1355-69) stated,

> Central to the faith and practice of Orthodox Judaism is the obligation of every religiously observant parent to provide for the extensive and thorough religious education of his child. For this reason, the continued vitality and development of Jewish religious all-day schools in the United States—which now number more than 300—is of paramount importance to the Orthodox Jewish Community . . . we believe it essential to refute *in limine* suggestions of the kind made repeatedly by opponents of religious schools that they are, in one form or another, established or supported in order to achieve the segregation of schoolchildren by race. (pp. 1-3)

In some cases there is no significant dividing line between the secular and the religious, *Wash. Ethical Soc.* v. *District of Col.*, 249 F.2d 127 (D.C. Cir. 1957) and in others race and religion merge and find expression in schools of religious/ethnic/national origin grouping, e.g. Black Muslims, Shinto, the Native American Church, and Amish or Mennonite schools.

In sum, while a tenth of the children in this country attend private schools, only a tenth of these—or about 1% of the overall total—attend secular private schools. Of this 1% some unknown proportion attends private

schools segregated into groups representing every race, national origin and sex (A. 168-172) while the rest presumably attend integrated private schools. The total of all schools segregated purely by any race is therefore a *de minimis* factor in the overall picture of education in this country but the diversity is still such that every parent retains an ability to select either integrated public education, or integrated or segregated private schooling to suit their particular secular or religious beliefs or philosophies.*

B. *SISA Schools Do Educate*

Whether or not integrated public schools do polarize racial self-identification is a matter of considerable debate. Whether the end result to be achieved by schools is social adaptation or the acquisition of academic skills is equally a matter for learned disputation. But whatever ultimate conclusions may result from these debates is not the point here. Our question is merely one of the right of parents to choose for themselves between such conflicting theories.

Most SISA schools offer a curriculum designed for college preparation on standard subjects, and continue the minor patriotic and religious observances (A. 167) which are now excluded from public school functions [*W. Va.* v. *Barnette, etc.*] but which some parents continue to prefer.

> Private schools may propagate a sectarian viewpoint, while public schools may not.

* * * *

---

* This local availability of alternate school options is almost always ignored by writers who comment on the SISA schools, e.g. "Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination" 84 *Yale L.J.* 1441 (1975).

> In addition, private schools may discourage criticism and irreverence toward existing institutions or policies while public schools may not.
>
> *Bright* v. *Isenbarger*, 314 F. Supp. 1382, (N.D. Ind. 1970) *aff'd per curiam* 445 F.2d 412 (1971)

SISA schools are popularly referred to as "flight schools", "segregation" or "rebel yell" academies and the like. The innuendo is that these schools exist to express a die-hard political belief rather than an educational advantage, e.g. Note, 82 *Yale L.R.*, pp. 1436-61 (1973).

The SISA evidence, which the District Court refused to admit is altogether to the contrary. As summarized by the District Court such evidence, uncontradicted on the record, would have shown

> That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies (A. 140).

By affidavit, SISA showed that its schools on the basis of standardized tests were advanced academically by a year and a half to two years over their local public schools (A. 166) while operating at low per-pupil costs. To the extent therefore that parents retain a constitutional right to select a private school even for scholastic reasons alone, the SISA schools offer the kind of education many such parents would choose.

The belief that more competent education can be found outside the public school system is not an idea unique to SISA parents. As once stated by Professor Bickel,

> It is all too facile, and not a little self-righteous, to ascribe resegregation purely to racism. After all, there is a good reason to believe that when the middle class becomes a minority in a classroom, the educational process, as conceived from its point of view, suffers.

Hearings, Select Committee on Equal Educational Opportunity, United States Senate, 91st Cong. 2d Sess. Pt. 3E at 2265, (September 24, 1970).

C. *Segregation May be Desirable in Education.*

SISA knows that this statement is popularly regarded as a form of educational heresy and recognizes that this Court was undoubtedly expressing its utter disbelief in the possible truth of this principle in the quoted statement from *Norwood*. Yet, emotion apart, and considered from the point of view of a question of educational method, the answer is not simple but is rather one of considerable technical difficulty. Both by affidavit and proffer SISA tendered evidence that the racial coherence of a student group is in fact causally related to better education (A. 165, 226-A). The District Court accepted the fact that the testimony of SISA's expert would be to that effect (Inter. Exh. 1, A. 149), a principle not only true as to white children but equally so for every type of group definition whether racial, sectarian, or by national origin, sex, or economic level, a pedagogy that finds an inverse relation between learning in the classroom and the sum of the pupil conflicts present. SISA offered to prove that substantial educational theory exists to show that among the several races, differing learning patterns are a characteristic of each group without regard to the high or low level of an individual student's capacities, (Inter. Exh. No. 2, A. 154).

Recently an Indian group claimed the same necessity for their race, *Wind River Indian Educ. Ass'n* v. *Ward*, (No. 74-1568, *cert. denied*, —— U.S. ——, 96 S.Ct. 205 (1975)). Programs in black studies have been approved. The City of Philadelphia unsuccessfully tried to show a court recently that graduates of all-girl schools did better in college than girls graduating from co-educational high schools. Some of the Court's findings were

> 32. The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance.
>
> 33. There are educators who regard education in a single-sex school as a natural and reasonable approach.
>
> 34. . . . She first found that the percentage of women graduating from women's colleges who were later listed in Who's Who was two to three times greater than the percentage of women so listed who were graduates of coeducational institutions.
>
> . . .
>
> 38. Dr. Tidball testified that it would not be unreasonable to apply her findings to the secondary level, including academic high schools. . . .
>
> *Vorchheimer* v. *School District of Philadelphia*, 400 F. Supp. 326, 329-30 (E.D.Pa. 1975)

In short, whatever may be thought to be the social values of public school integration, there is competent evidence to indicate that coherent group instruction can be more effective academically than classroom heterogeneity. Whether or not a belief that this is true will receive ultimate acceptance by educators, SISA parents do at least have rational grounds to believe that "segregation is desirable in education"—and it can hardly be said that the scholastic and disciplinary accomplishments of the SISA schools have proven such belief to be in error.

D. *SISA Schools Do Accord with National Policy.*

The maintenance of a pluralistic culture is a nationally expressed policy.

> Independent schools in the United States exemplify the commitment of their benefactors to the American free enterprise system—and, in a sense, to freedom itself. . . .

> Twenty-four Presidents of the United States were educated in private colleges and universities, as were 287 Senators and Representatives serving in the present Congress. . . .
>
> I am all for an open marketplace for ideas and learning experiences.
>
> Private institutions both complement and compete with public education in America—and millions of Americans have enjoyed the diversity of benefits this dual system has produced. I believe that every American who has a desire to learn should be given the chance to learn.
>
> Address by President Ford at Pepperdine University, Reprinted in *Firm Foundation*, November 4, 1975 at p. 3 [691].

The same thought was earlier expressed by a specially appointed commission.

> One significant way in which nonpublic schools serve the public purpose is that they provide diversity, choice and healthy competition to a traditional public education. There are many who equate diversity and pluralism with divisiveness and polarity. They argue that the very persistence of ethnic and cultural differences causes prejudices and discrimination. They hold that a major function of education is to eliminate these differences and create a more pervasively American ethos and culture.
>
> Without passing on the desirability of the persistence of differences or in any way attempting to design the future of American culture, we must remember that differences do exist. Where they are submerged or repressed and cannot be expressed through social and political institutions they eventually erupt in detrimental ways. At the very least then, nonpublic schools serve the public purpose by providing the means for a substantial group of Americans to express themselves socially, ethnically,

culturally, and religiously through educational institutions.

> *Final Report of the President's Commission on School Finance*, U.S. Govt. P. Off., March, 1972, pp. 53-54.

Or, as the value of pluralism has been put by this Court,

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. *West Virginia State Board of Education, et al.* v. *Barnette, et al.*, 319 U.S. 624 (1943)

That a pluralistic viewpoint may not always dictate the same result as a national policy of public school integration is simply to state a conflict that exists between diverse goals of society.*

This contradiction, however, should not be solved by judicial or other compulsion, a compulsion that would necessarily place this Court in the position of not merely ruling on what is legal or non-legal, but what is desirable

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* "The American Roman Catholic bishops have approved for bicentennial use an ethnic mass that departs from the 'melting pot' theory and recognizes the pluralistic traditions coexisting in the United States." *The Washington Post*, Sunday, Dec. 21, 1975, p. B-8.

or undesirable in the application of the Constitution to our society.

> Our individual preferences, however, are not the constitutional standard.
>
> *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952)

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not now occur to us.
>
> *West Va.* v. *Barnette*, *supra* at 642.

The same distaste for imposed solutions is to be found in professorial comment,

> The right of the government to *compel* personal associations, as by forbidding racial discrimination in schools . . . must be framed in terms of drawing the line between the public and private sectors of our common life.
>
> Emerson, "Freedom of Association and Freedom of Expression" 74 *Yale L.J.* 1, 20 (1964)

Professor Wechsler has said much the same,

> But if the freedom of association is derived by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension not unlike many others that involve the highest freedoms that Professor Sutherland has recently described. See *The Law and One Man Among Many* (1956), 35 et seq.
>
> Prof. Herbert Wechsler (Oliver Wendell Holmes Lecture, Harvard, 1959) "Toward Neutral Principles of Constitutional Law" (p. 39).

CONCLUSION

This petitioner prays a reversal of the rulings below and reinstatement of its counterclaim on the grounds (1) that the issue has not been foreclosed by the prior decisions of this Court, (2) that to the contrary, three prior rulings support petitioners position, (3) that in any event § 1981 does not compel private school admission, (4) that if it did, it would violate the constitutional freedom of parents to select petitioner's schools, and (5) that their choice in this regard is in accord with the national policy of pluralism in our society.

Respectfully submitted,

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5 Jan. 76

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

PETITIONER'S REPLY BRIEF

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Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

PETITIONER'S REPLY BRIEF

THE RESPONDING BRIEFS

The responding briefs * collectively raise a point which

* Brief for the Respondents; Brief Amicus Curiae of National Education Association (NEA); Brief Amici Curiae of Council for American Private Education, National Ass'n of Independent Schools and Southern Ass'n of Independent Schools (CAPE); Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, American Jewish Congress, National Ass'n for the Advancement of Colored People and American Civil Liberties Union (ADL).

was not discussed in petitioner's principal brief, a matter which SISA would have considered irrelevant to the present issue were it not for the fact that the same question was mentioned by this Court in the *Gilmore* opinion as a possible consideration.

We speak of what NEA has termed the "ignoble purpose" of SISA parents to take their children out of desegregated public schools (NEA Bf. 8) with the effect that "they undercut effective school desegregation" (NEA Bf. 11). Respondent claims it to be a matter of public record that whites are "fleeing" from desegregated public schools (Resp. Bf. 25 ftn. 13) to "avoid effects of court-ordered desegregation decrees" (ADL Bf. 18).

SISA would not, and possibly could not, deny that some percentage of its parents may be so motivated. It has no information on the subject, having regarded it as improper to inquire into an individual's reasons for the exercise of what SISA believes to be a constitutionally protected parental right of school selection. As its principal brief shows, SISA is still of that opinion and argues in this reply that absent a predictable and substantial destruction of similar and preferred First Amendment rights held by others, no person should be called on to justify or explain his reasons for the exercise of a protected freedom.

> The requirement of *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect infringement of the members' associational rights.
>
> *Healy* v. *James*, 408 U.S. 169, 183; 92 S.Ct. 2338, 2347 (1972)

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion."

Torcasco v. *Watkins*, 367 U.S. 488, 495; 81 S. Ct. 1680, 1683 (1961)

* * * *

This reply is made in three parts: the scope of this public school withdrawal problem, the law on the right of withdrawal from public facilities, and the extent of the infringement if any, that the student association in SISA schools threatens with respect to the similar rights of others.

I

SISA Is Not A Principal Cause Of Public School Student Withdrawal.

The social problems created by the efforts of many persons and organizations to effectuate their claim of a constitutional obligation to desegregate public school systems have become national in scope.

In *Gilmore* you noted

> . . . the very exercise of the freedom to associate by some may serve to infringe that freedom for others.
>
> 417 U.S. 556, 575, 94 S.Ct. 2416, 2427 (1974)

It is reasonably patent that every exercise of a constitutional freedom by one individual diminishes the area of choice remaining to every other person. Attendance at church A diminishes the potential attendance at church B. The exercise of free speech to support dogma C lessens the potential recruitment in support of dogma D. The adherence of one unit of our free press to party E eliminates it as a potential adherent to party F. And, if it be argued that the action of one citizen would normally have no more than a *de minimis* effect, the reply is, how would you select which individuals in any given group of citizens should lose their constitutional freedom simply because others had already exercised the same privilege?

In precisely this sense every child who attends a private school—white or black or religious or other—diminishes the potential representation of his group in the public school of his neighborhood. And if that public school happens to be the subject of a desegregation order then every white or black child who is attending a private school reduces *pro tanto* the possibility of achieving some ideal of proportionate compliance based on the local student population.

But, this probable, and possibly inevitable, effect on the character of public school attendance is not limited in any sense to the children who are registered in the SISA schools. How many of the four million children in parochial schools were taken out of the public schools after 1954 for the same reason? For that matter, how many of the quarter million black children attending private schools in 1970-71 or now, had or have the same underlying motivation?

Or, we can take the even more important factor of "white flight", which this Court has sometimes taken into consideration in reviewing desegregation plans, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 458; 88 S.Ct. 1700, 1705 (1968); *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 464, 92 S.Ct. 2196, 2204 (1972). White flight is a recognized national social phenomenon. The reason most often given by courts for this shift to the suburbs is a conscious or subconscious dissatisfaction of the parents with desegregated urban public school systems. Compared to the handful of children withdrawn from local public schools to attend private schools, "white flight" is by far a larger factor in determining the future character of our public schools, e.g., *Spangler* v. *Pasadena City Board of Education*, 519 F.2d 430 (9 Cir. 1975) (*Cert. Granted*, No. 75-164); *Mapp* v. *Bd. of Ed. of City of Chattanooga*, 525 F.2d 169 (6 Cir. 1975) (Petition here, No. 75-1077), *Calhoun* v. *Cook*, 522 F.2d 717 (5 Cir. 1975).

In short, the withdrawal of public school students to go to SISA schools is at most a minor part of the national difficulty in finding enough children to comply with some segregation orders. Both are simply a part of a national pattern of parent decision. As explained by this Court

> Education, perhaps even more than welfare assistance presents a myriad of "intractable economic, social, and even philosophical problems."
>
> *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301 (1973)

II

The Law Recognizes A Right Of Withdrawal From Public Facilities.

Mr. Justice Brandeis in one of his now famous dissents summarized the underlying essence of all negative Constitutional rights of the individual

> The makers of our Constitution . . . conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.
>
> *Olmstead* v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572 (1928)

It is this ability to walk away, to withdraw from a situation which a person refuses to accept, that constitutes the last recourse of the individual. When that refuge no longer remains, then a condition of slavery or dictatorship exists by definition—the power to compel the individual to accept and act in accordance with someone else's beliefs of moral right or governmental efficiency.

But when people do walk away from a publicly supported activity maintained at their cost and for their presumed benefit, that support may dwindle to the vanishing point.

The partial or complete frustration of an affirmative governmental purpose resulting from an exercise of an individual's right to withdraw from state-financed activities for racial or religious reasons is regarded as *damnum absque injuria* in the law. In the two *Pierce* cases you sustained the parents' right to withdraw children from the public schools despite a state law to the contrary. In *Yoder* you held that children could be withdrawn from state-compelled public schooling after threshold training in support of their parents' religious beliefs. In *Abney* you allowed the withdrawal of park property from bi-racial public use. In *Moose Lodge* you permitted the withdrawal of members from forced association with other segments of the general public.

For the same reasons lower courts have allowed the closings of public swimming pools, *Palmer* v. *Thompson*, 419 F.2d 1222 (5 Cir. 1970), *aff'd*, 403 U.S. 217, 91 S.Ct. 1940 (1971); *Tonkins* v. *City of Greensboro*, 276 F.2d 890 (4 Cir. 1960); or the sale of a public golf course, *Charlotte Park and Rec. Comm.* v. *Bairinger*, 252 N.C. 311, 83 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), *id. Johnson* v. *Branch*, 364 F.2d 177 (4 Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

And you have many times held that such withdrawal from generally accepted forms of activity is not to be penalized.

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect to penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly". *Spieser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Such interference with constitutional rights is impermissible.
>
> *Perry* v. *Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972)

Among the many judicial expressions of this basic principle, we find only two cases interpreting its application to public withdrawal from public schools for the purpose of sending them to white private schools, *Berry* v. *Macon County Bd. of Educ.*, Civil A. No. 875-E (no official report, M.D. Ala. July 23, 1971), and *Cook* v. *Hudson*, (No. 75-503 *cert. granted*, Mar. 1, 1976). In *Berry* it was held that the teacher plaintiffs could not be dismissed from public employment to punish them for withdrawing their own children from a desegregated public school to send them "to an all-white segregated private academy"—even though their jobs could otherwise have been terminated on any non-constitutional basis. *Cook* was a holding to the contrary and SISA believes it was wrongly decided, *Perry* v. *Sinderman*, *supra*.

III

It Is The Proposed Desegregation Of The SISA Schools Which Is A Direct Restriction On The Right of Association.

The physical action of withdrawing a child from public school to send him to a SISA school, is not belief *per se* but rather is a form of expressing a belief. The responding briefs make much of the fact that the elimination or desegregation of the SISA schools would not deprive any of its parents of their right to hold a particular belief, merely to express it, (e.g. ADL bf. p. 7).

It is of course conceded that at least since Mr. Justice Holmes' famous illustration of the clear and present danger test, various forms of expression of First Amendment freedoms have been subjected to "reasonable regulation" of "time, place and manner", *Buckley* v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976). But to sustain such regulation three tests must first be met, none of which is applicable here.

First, the form of expression used should not include public violence, *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968). Second, a restriction on the time, place and manner of exercising the freedom should be "unrelated to the restriction of 'that freedom' ", *Buckley* v. *Valeo*, *supra*. Third, any such limitation must meet the test formulated in *Thomas* v. *Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 322 (1945) and subsequently repeated in *Shubert* v. *Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795 (1963)

> Only the gravest abuses endangering paramount interests give occasion for permissible limitation.

The selection of SISA schools by parents offends none of these tests.

It is reasonably patent that the action of the SISA parents is non-violent in character. The form in which they exercise their constitutional freedom is consonant with the laws of every state and community in which the schools are located. No judicial choice has to be made here as to whether some "compelling interest" restriction is to be enforced. Equally, the continued maintenance of SISA schools in their present form involves no existing breach of any statute, or even of the licensing laws of the states concerned.

Second, the responding brief proposals to eliminate or integrate the SISA schools are directly related to the restriction of communication by the SISA parents—to the point of eliminating the last refuge in which their belief can presently find expression. The responding briefs claim that SISA parents will remain free to believe in the value of segregation in education—but argue the contradictory proviso that this belief must only be expressed in an integrated private school. An example of this contradition in terms is to be found in the ADL brief. There a plea is made on behalf of a "*bona fide*"

"qualified" (p. 13) applicant, presumably meaning a black child who sincerely believes in white segregated education but also believes that concept can only be expressed by desegregating the school which teaches it. Therefore it is not any admission policy of SISA's schools which infringes the interests of others, but rather the contrary proposals in the responding briefs that are directly related to restricting the associational rights of the SISA parents.

Third, does the limited admission policy of SISA schools constitute a "grave abuse" which "endangers paramount interests" of others?

There appears to be no definitive authority on what constitutes a "grave abuse". The fact situations in the cases appear to indicate that the phrase refers to some major departure from the conduct norms described in penal statutes, *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99 (Sup. Ct. Tenn. 1975).

As noted, the maintenance of the SISA schools as presently constituted violates no local or federal statute. Nor is there any "abuse" of established community norms. During more than a hundred and fifty years in our republic before 1954, and for some thousands of years prior to our independence, the discriminative choice now being made by SISA parents was one which accorded with community custom in every known country. True, for the past twenty years, such preference for one's own group—at least with respect to white citizens —has been castigated as "racist". Yet it is the identical attitude which for the greater part of human history was described more favorably as "ethnocentric" and accepted as a customary personal attitude. While future events may prove that the newer vision is the only "right" one, and while there is little doubt that our institutions both public and private are currently being conformed to this modern view, the action taken by the SISA parents can at most be read as an outdated adherence to older educa-

tional belief, not as an abuse of or serious departure from long-established community standards.

Moreover, if every individual departure from current social norms is to be equated with the test of what constitutes a "grave abuse", then there would literally be no remaining scope for the expression of contradictory opinion or even the exercise of any First Amendment freedom. To the extent therefore that there remains any permitted exercise of the freedom of disagreement on this subject, these SISA schools constitute both an orderly and time-honored form of expressing previously acceptable ideas, an "abuse" only in the sense of an inability to concur with the views expressed in the responding briefs.

Can it be said that the SISA schools endanger the "paramount interests" of others? SISA says "no". First, what are those interests? The only non-discrimination interest we find detailed is in the introduction to the CAPE brief and accords with the action taken by the courts below:

> the opportunity of a private education [should] be available to those black persons as well as those white persons who seek it and can qualify for it. (Bf. p. 4)

It is not clear that the opportunity referred to is "paramount". Even the opportunity of a public education may not be a constitutional requisite, *San Antonio School District* v. *Rodriguez*, *supra*. But *arguendo* we assume it is such an interest.

SISA would concede that a different case might be presented if a SISA school was so located in the midst of a deserted area that its rejection of an applicant effectively destroyed any possibility of private or public schooling for the rejectee. As you said in *Rodriguez*, some "identifiable quantum of education [may be] arguably entitled to constitutional protection" (p. 37). But

when we read the responding briefs we find that it is compulsory education beyond state law through primary and secondary schooling which most of the commentators and the present responding briefs assume to be the requirement—and to which they would add the word "integrated."

Even if they were right in this regard the illustration we have assumed could hardly be further from the facts of this record. In our principal brief it was pointed out (pp. 32-33) that every school parent—not merely the SISA parents—has available a broad spectrum of choice of integrated or segregated education in public or private schools. It was noted that the record shows that all SISA schools are stipulated to be

> located in areas having cost-free desegregated public education available to all children
>
> (SISA bf. p. 4)

supported *pro tanto* by the SISA parents who in addition are assessed the costs of private tuition.

And the validity of those options is further made patent by the CAPE brief. CAPE claims to represent some 13,500 private schools all of which are integrated and states that 138 of those integrated private schools are located "in the same area of the country as the schools which are affiliated with SISA" (pp. 3, 17).

The continued operation of the SISA schools in their present form therefore does not endanger either private integrated educational opportunity or any other school attendance interests of other children. To the contrary it is these SISA parents who pay their share of public school support so that the children of others will have available to them the choice in education which these parents exercise for their own children.

Therefore the continued maintenance of the SISA limited admission policy is valid under any of the several

tests which have been applied to restrict the form of associating to express an unpopular belief.

CONCLUSION

SISA's policy of individual parental freedom in education is a simple one perhaps not fully understood by respondent and these *amici*. SISA supports the right of parental school choice as much by the self-identified "American Jews" and "Black Americans" whose organizations have joined in the ADL brief (p. 2), and by any other racial or religious group. As much as the claim of right for its own parents, it accepts and would support the integration preferences of the more numerous CAPE parents. In short, SISA argues for every parent having a right under the First Amendment to select any public or private school which will express their melting pot or pluralistic viewpoint, regardless of whether they do so for the purpose of conserving an older culture or creating a new order responsive to later opinion.

That some parents do choose SISA schools is simply one part of a national pattern of selective association. That the aggregation of all parent choices in this regard may on occasion leave an inadequate number of children of one or another group to form some idealized balance in public school association is a normal result of the exercise of the constitutional right to be let alone, to withdraw one's family from further participation in public activities. Above all, the action of the SISA parents neither constitutes an abuse of their own constitutional privilege nor denies its exercise to any others.

What SISA claims in this case is the right of its parents to make their own school choice and not to be called on to justify their reasons for doing so. To interpret § 1981 so as to restrict that choice would deny

them any remaining possibility of exercising their constitutional freedom to associate their children in a private school expressive of their beliefs.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,

Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, etc., *et als.*,

Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, *et al.*,

Defendants.

PETITIONER'S SUPPLEMENTAL BRIEF FILED PURSUANT TO RULE 41(5)

The ruling in *Vorchheimer v. School District of Philadelphia*, 400 F. Supp. 326 (E.D. Pa. 1975) cited at pages 35-36 of this petitioner's brief was reversed by the Third Circuit Court of Appeals on March 16, 1976, (3 Cir. No. 75-2005), 44 U.S. L.W. 2473.

In reversing the District Court the appellate court held that state supported sex segregation in two public high schools of Philadelphia did not violate either statutory or Constitutional requirements.

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20 April, 1976

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